

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF ILLINOIS )  
 )  
Petition for a Certificate of Public Convenience and )  
Necessity, pursuant to Section 8-406.1 of the Illinois )  
Public Utilities Act, and an Order pursuant to Section 8- )  
503 of the Public Utilities Act, to Construct, Operate and ) Docket No. 12-0598  
Maintain a New High Voltage Electric Service Line and )  
Related Facilities in the Counties of Adams, Brown, )  
Cass, Champaign, Christian, Clark, Coles, Edgar, Fulton, )  
Macon, Montgomery, Morgan, Moultrie, Pike, )  
Sangamon, Schuyler, Scott and Shelby, Illinois. )

**AMEREN TRANSMISSION COMPANY OF ILLINOIS' RESPONSE  
IN OPPOSITION TO PETITION TO INTERVENE AND DUE PROCESS MOTION TO  
STRIKE PROCEEDINGS AS TO THE MT. ZION TO KANSAS SEGMENT**

Pursuant to the Commission's Rules of Practice, 83 Ill. Adm. Code § 200.190(e), and the Administrative Law Judges' July 15, 2013 Notice, Ameren Transmission Company of Illinois (ATXI) respectfully submits this response in opposition to the Nancy C. Wiest, John L. Channon, and Bryan C. Channon's, as Co-Trustees of the Channon Family Trust, (the Channon Trust) petition to intervene and "due process" motion to strike the instant proceedings to date as to the Mt. Zion to Kansas portion of the Illinois Rivers Project.

**INTRODUCTION**

The Channon Trust has filed a petition and motion that essentially asks the Commission to disregard all of the evidence in this proceeding related to the Mt. Zion-Kansas segment of the Transmission Line and start over. Ignoring the fact that it received all the process due under Section 8-406.1 and Commission rules, the Channon Trust claims that, because it did not know about this proceeding until recently, the Commission must now allow it to intervene, and must make *everyone* re-litigate routes for the Mt. Zion-Kansas segment.

Fortunately, the Commission's rules anticipate this scenario, and expressly prohibit

parties (or putative parties) from intervening at the eleventh hour to re-litigate issues already heard and decided prior to a petitioner's motion to intervene. Rule 200.200(e) requires a petitioner to "accept the status of the record as the same exists at the time of the beginning of that person's intervention." 83 Ill. Adm. Code § 200.200(e). An exception applies "for good cause shown," but no cause exists here for the simple fact that all notices required by statute and Commission rules have been provided. MCPO addresses whether it properly included the Channon Trust in its landowner list in accordance with the ALJs' directive. But, irrespective of whether the Trust was on the list, there are no grounds to re-open the proceeding. The Commission's rules are clear here, too: "The foregoing provisions for notice to owners of record shall not be deemed jurisdictional and the omission of the name and address of an owner of record from the list or lack of notice shall in no way invalidate a subsequent order of the Commission relating to the application." 83 Ill. Adm. Code § 200.150(h).

The Channon Trust's petition says it will accept the record as it is, but clearly it does not mean what it says. The express purpose of the petition is to "strike the proceedings to date in this matter insofar as they pertain to the Mt. Zion to Kansas segment of the project, so that Petitioners can be afforded the same rights as other property owners . . . ." (Channon Pet. at 3.) The Channon Trust is merely paying lip service to the requirement that it accept the record as it is. Its petition must therefore be denied. To the extent the Commission wishes to grant intervention, it must do so with the express caveat that the Channon Trust accept the record as it stands.

## ARGUMENT

### **A. The Channon Trust Is Not Willing to Accept the Record as It Stands.**

In its petition to intervene, the Channon Trust claims it “agree[s] to accept the record as it exists at the time of intervention.” (Channon Pet. ¶ 5.) We know that the Channon Trust does not really mean this, because it goes on to say that it seeks intervention for the purpose of “propos[ing] an alternate route [and] present[ing] direct and rebuttal testimony . . . .” (*Id.* ¶ 9.) The time for advocating route alternatives and submitting testimony has long since passed. (*See* Notice & Revision to Case Mgmt. Plan (Jan. 25, 2013) (establishing December 31, 2013 and February 13, 2013 alternate route deadlines and March 29, 2013 and April 12, 2013 Staff and intervenor testimony deadlines).)

Intervention for the purpose of re-litigating or supplementing the record contravenes the Commission’s rule requiring intervenors to be bound by the record as it exists as of the time of their intervention, 83 Ill. Adm. Code § 200.200(e), and established Commission precedent. *See, e.g., GTE North Incorp.*, Docket 93-0191, 1993 Ill. PUC LEXIS 488, \*3-6 (Order, Dec. 15, 1993) (denying late petition to intervene and motion to reopen the record); *Commonwealth Edison Co.*, Docket 02-0838, 2004 Ill. PUC LEXIS 438, \*12-15 (Order, Aug. 4, 2004) (denying late petition to intervene and objection to the record).

In *GTE North*, for example, the Commission denied a petition to intervene and motion to reopen the record filed after the close of evidentiary hearings and one month after the record was marked “heard and taken.” *GTE North*, 1993 Ill. PUC LEXIS at \*3-6. That case concerned GTE’s request for Commission approval of an agreement to purchase certain assets from its affiliate. *Id.* at \*1. After the close of evidence, ITN petitioned for intervention and moved the Commission to reopen the record on the grounds the record was misleading because it

understated the fair market value of the assets at issue. ITN alleged it was able to provide additional evidence regarding their value. *Id.* at \*3-4. The Commission disagreed, finding the petition not well taken at such a late stage of the proceeding. *Id.* at \*5. The Commission also found ITN failed to show good cause why the record should be reopened. The Commission grants additional hearings upon a showing of matters such as a material change of fact or of law, and an application to reopen a proceeding must contain a brief statement of the proposed additional evidence. *Id.* at \*5-6; 83 Ill. Adm. Code § 200.870. ITN’s motion, however, did not allege any material change in law or fact or contain a statement of the additional evidence it proposed to adduce. *Id.* at \*6.

Here, as in *GTE North*, the petitioner has failed to establish – indeed, to even argue – that good cause exists to allow its late intervention for purposes of supplementing or re-establishing the record. The Channon Trust’s petition to intervene must be denied.

**B. The Channon Trust’s Due Process Concerns Do Not Justify Intervention for the Purpose of Reopening the Record.**

Despite its unwillingness to accept the record as of its intervention, the Channon Trust argues it is entitled to intervene because it allegedly “did not receive proper notice of this proceeding as required by law,” resulting in denial of its “due process right to participate in this proceeding.” (Channon Pet. ¶ 6.) But all requisite notice of this proceeding was made and the Channon Trust has no “due process right” to participate in the proceeding. Its due process concerns lack merit, let alone suffice as cause to reopen the record of proceeding.

**1. All Requisite Notice of This Proceeding Was Provided.**

The Channon Trust contends it “did not receive proper notice of this proceeding as required by law . . . .” (Channon Trust Pet. ¶ 6.) This begs the question of what notice the law

actually requires. Section 8-406.1 of the Public Utilities Act (PUA) tells us. The statute requires ATXI to:

- (1) hold “a minimum of 3 pre-filing public meetings to receive public comment concerning the Project in each county where the Project is to be located no earlier than 6 months prior to the filing of the application,” 220 ILCS 5/8-406.1(a)(3);
- (2) publish “[n]otice of the public meeting . . . in a newspaper of general circulation within the affected county once a week for 3 consecutive weeks, beginning no earlier than one month prior to the first public meeting,” *id.*;
- (3) provide “[n]otice of the public meeting, including a description of the Project, . . . in writing to the clerk of each county where the Project is to be located,” *id.*;
- (4) invite “[a] representative of the Commission . . . to each pre-filing public meeting,” *id.*;
- (5) “publish notice of its application in the official State newspaper within 10 days following the date of the application’s filing,” 220 ILCS 5/8-406.1(d);<sup>1</sup> and
- (6) “establish a dedicated website for the Project 3 weeks prior to the first public meeting and maintain the website until construction of the Project is complete” 220 ILCS 5/8-406.1(e).

ATXI provided the requisite notice of the Project and the public meeting process. It established a Project website. (ATXI Ex. 4.0 (Murphy Dir.), p. 22.) More than three weeks later, it began holding public meetings in each county where the Project was to be located and in several adjacent counties, including Douglas County. All told, ATXI held nearly 100 public meetings to provide information related to the Project. (*Id.*, pp. 3-4, 22; ATXI Ex. 4.1.) It published notice of each public meeting in a newspaper of general circulation within the affected county. (ATXI Exs. 4.0, p. 14; 4.8.) It sent written notice of the public meetings to the clerk of each county and invited a Commission representative to attend as well. (ATXI Exs. 4.0, p. 14; 4.7.) ATXI also published notice of its application in the State newspaper subsequent to filing its

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<sup>1</sup> Notice by publication is precisely the manner by which ratepayers may learn of a pending rate case. There is no requirement that each ratepayer be provided individual notice. *See* 220 ILCS 5/9-201.

petition on November 7, 2012. (Cert. of Publication (filed Dec. 11, 2012).) Notably, no party to this proceeding disputed that ATXI complied with these notice requirements and, in their July 3, 2013 Proposed Order, the ALJs did not conclude otherwise.

Section 8-406.1 also directs the Commission to provide certain notice. It requires that the Commission grant a certificate of public convenience and necessity if it reaches particular findings “after notice and a hearing.” 220 ILCS 5/8-406.1(f). Beyond the public notice described above, the statute does not tell us *what* additional notice, if any, the Commission must provide, or to *whom*. Other sections of the PUA, however, provide that guidance. Section 10-108 of the Act provides the what: in all “hearings” held by the Commission, it must provide notice of the time and place fixed for hearing no less than ten days prior to hearing. 220 ILCS 5/10-108.<sup>2</sup> Section 10-110 provides the whom: the public utility and “such other interested persons as the Commission shall deem necessary.” 220 ILCS 5/10-110. *See also* 220 ILCS 5/10-108 (“Notice of the time and place shall also be given to the complainant and to such other persons as the Commission shall deem necessary.”).

The Commission’s Rules of Practice tell us whom the Commission has deemed “interested persons” entitled to notice of an application for a certificate of public convenience and necessity. Section 200.150(h) requires that the Commission provide notice of the “initial hearing” in proceedings under Sections 8-406 or 8-503 of the PUA<sup>3</sup> to “each owner of record of

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<sup>2</sup> Section 200.530 of the Commission rules mirrors this requirement. 83 Ill. Adm. Code § 200.530. Section 200.150(f) requires that the notice contain additional information, including a statement of the nature of the hearing, citation to applicable legal authority, a statement of the matters asserted and of the consequence for failure to respond, and certain other case identification and contact information. 83 Ill. Adm. Code § 200.150(f).

<sup>3</sup> The first clause of the rule states that it applies to applications filed under Sections 8-406 or 8-503. ATXI’s Petition expressly includes a request for relief under Section 8-503. Section 8-406.1(i) states, “a decision granting a certificate under this Section shall include an order pursuant to Section 8-503 of this Act authorizing or directing the construction of the high voltage electric service line and related facilities as approved by the Commission, in the manner and within the time specified in said order.” 220 ILCS 5/8-406.1(i). Consequently, any petition filed under

the land [upon or across which the public utility proposes to construct facilities] as disclosed by the records of the tax collector of the county in which the land is located . . . .” 83 Ill. Adm.

Code § 200.150(h). But that rule contains an important caveat:

The foregoing provisions for notice to owners of record shall not be deemed jurisdictional and the omission of the name and address of an owner of record from the list or lack of notice shall in no way invalidate a subsequent order of the Commission relating to the application.

*Id.* (emphasis added). The reason for this caveat likely is twofold: (1) it protects the Commission Clerk in the event of inadvertent error or omission; and (2) it recognizes that, as explained below, a landowner has no property interest at stake in a proceeding to grant a public utility a license to construct utility facilities on his property.

The Commission’s rules also permit the Commission or its ALJs to provide for additional notice. 83 Ill. Adm. Code § 200.150(n). In this proceeding, pursuant to that rule, the Commission provided the same notice required under Section 200.150(h) to landowners along any alternate routes for the Project proposed by an intervening party pursuant to the ALJs’ case schedule. (*See* Jan. 31, 2013 and Feb. 15, 2013 Notices.)

The Channon Trust’s argument that the Illinois Administrative Procedure Act (APA) requires that *property owners* receive mailed written notice of the proceeding (*see* Channon Pet. ¶¶ 7-8; Wiest Affid. ¶ 6) is simply wrong. Property owners are not “parties” under the Act unless and until they petition the Commission to participate in the proceeding. The APA defines “party” as “each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.” 5 ILCS 100/1-55. Similarly, Commission rules require that service be made only on “parties,” and define that term, in pertinent part, as any person who

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(continued...)

Section 8-406.1 must, as a practical matter, include a request for an order under Section 8-503. Because Rule 200.150(h) applies to filings under Section 8-503, the rule applies to Section 8-406.1 proceedings as well.

“is allowed by the Commission or by statute to intervene.” 83 Ill. Adm. Code §§ 200.530 & 200.40. The Channon Trust has not been named or admitted as a party to this proceeding, and it did not seek to become a party until July 15, 2013. Because it is not a party, it is not entitled to notice of this proceeding under the APA.

The Channon Trust relies on *People ex rel. Commerce Comm’n v. Operator Commc’n, Inc.*, 281 Ill. App. 3d 297 (1st Dist. 1996), in support of its position that the APA requires that landowners receive mailed written notice. (Channon Pet. ¶ 7.) This case does not aid the Trust. In *Operator Commc’n, Inc.*, the First District found that the Commission violated the APA and procedural due process when it failed to provide notice of the hearing in a contested case to a public utility whose activity the Commission enjoined in that case. *Operator Commc’n, Inc.*, 281 Ill. App. 3d at 303. The case stands for the unremarkable proposition that a public utility must receive notice of the hearing in a contested case. The case does not stand for the proposition that property owners have a due process right to notice of certificate of public convenience and necessity proceedings before the Commission.

**2. The Channon Trust Does Not Have a “Due Process Right” to Participate in this Proceeding.**

The Channon Trust next argues, because it did not receive direct written notice of this proceeding, it has been denied “due process.” (Channon Pet. ¶¶ 6, 9.) The authorities are clear, however, that a certificate proceeding *does not* implicate the due process rights of affected landowners. Granting a certificate to a utility is in the nature of a license, and granting such a license does not deprive affected landowners of any property interest. *See Quantum Pipeline Co. v. Ill. Comm. Comm’n*, 304 Ill. App. 3d 310, 317 (3d Dist. 1999).

“[T]he Supreme Court has held, on numerous occasions, that landowners on a path proposed for certification have no right to notice of the proceedings addressing certification,

because the granting of a certificate deprives them of neither their property nor of any interest therein.” *Quantum Pipeline Co.*, Docket Nos. 96-0001, et al. (Cons.), 1997 Ill. PUC LEXIS 873, \* 36 (Order, Dec. 17, 1997), citing *Chi., Burlington & Quincy R.R. v. Cavanaugh*, 278 Ill. 608, 617 (1917). A certificate of public convenience and necessity is a grant of license that merely enables a utility to exercise eminent domain at some future time in the circumstance that another resolution is not reached. *Egyptian Elec. Coop. Ass'n v. Ill. Comm. Comm'n*, 33 Ill. 2d 339, 342-43 (1965); *Chicago Ry. Co. v. Comm. Comm'n*, 336 Ill. 51, 70 (1929).

In *Egyptian Electric Coop.*, the Supreme Court affirmed a Commission order denying three separate petitions to intervene filed by an alleged competitor, customer, and landowner along a proposed transmission line route in a certificate of public convenience and necessity proceeding because it found petitioner had failed to show the requisite interest in the proceeding. *Egyptian Elec. Coop. Ass'n*, 33 Ill. 2d at 342. The petitioner was unable to show a requisite interest in the proceeding because “any rights [petitioner] would have as a landowner may be asserted in the condemnation suit. They are not affected simply by the conferring of a power of eminent domain upon a utility corporation.” *Id.* at 343. See also *Ill. Power Co. v. Lynn*, 50 Ill. App. 3d. 77, 81-82 (1977) (granting of certificate of public convenience and necessity does not bar re-litigation of issues in subsequent condemnation proceeding).

The law is clear: inclusion of landowners in proceedings concerning the issuance of a certificate of public convenience and necessity is not a due process right. Because it has no due process right at stake in this proceeding, the Channon Trust’s due process allegations are meritless, and they do not suffice as cause (let alone *good* cause) to permit the Trust to intervene, reopen the record, and re-litigate a portion of the Project.

### **3. Denying Intervention Will Not Void The Commission's Order.**

The Channon Trust threatens that “the entire order in this proceeding may be determined void” if the Commission does not grant it intervention and reopen the record. (Channon Pet. ¶ 9.) This is not true. As already explained, all requisite notice of this proceeding was made, and the Channon Trust, as a property owner in Douglas County, received constructive notice of the Project via newspaper ads and public meeting notices. Moreover, the Trust does not have a “due process right” to participate in this proceeding. And regardless of whether the Trust *should* have received notice from MCPO, any defect in this notice does not invalidate a final order. 83 Ill. Adm. Code § 200.150(h).

#### **C. Re-litigating the Mt. Zion-Kansas Portion of the Project Is an Unwarranted and Disproportionate Response to the Channon Trust's Concern.**

In considering the Trust's request to re-litigate the entire Mt. Zion-Kansas segment, first and foremost, they have no lawful entitlement to any remedy. But even if the Commission were to consider the equities at issue, the Commission should find that the equities of the situation weigh decidedly against the Trust.

As stated, notice of the proceeding was communicated – extensively – throughout myriad counties in Illinois, including Douglas County where the Channon Trust allegedly owns property. As a result of that notice, nearly 100 parties intervened and participated in this case. As a result of that intervention, the Mt. Zion-Kansas portion of the Project, among others, was extensively litigated and briefed. The ALJs have issued their Proposed Order and proposed conclusions regarding that portion of the Project. To permit the Channon Trust to undo what the parties and the ALJs have accomplished to date—at the expense of substantial time and money—would unfairly elevate the Trust's interests over everyone else's. That would not be fair. The Channon Trust is not entitled to special treatment.

It also bears noting that the route the Channon Trust is complaining about – and other routes, as well – was actually litigated in this proceeding. Evidence was presented for and against the route approved in the Proposed Order. It is far from clear what would be gained if the Trust were permitted to intervene and litigate the route yet again. Surely, enough evidence has already been heard about landowners who don't want to look at transmission lines. It may be fairly assumed that the Channon Trust property owners do not want to look at transmission lines, either. Intervention and re-opening the record need not be granted for the purpose of accepting additional evidence that would only serve to confirm the obvious.

### **CONCLUSION**

For the reasons set forth above, ATXI respectfully requests that the Commission deny the Channon Trust's petition to intervene and related motion to strike. If the Commission grants the petition to intervene, it should do so with the express caveat that the Channon Trust accept the record as it stands.

Dated: July 18, 2013

Respectfully submitted,

Ameren Transmission Company of Illinois

/s/ Albert D. Sturtevant

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**CERTIFICATE OF SERVICE**

I, Albert D. Sturtevant, an attorney, certify that on July 18, 2013, I caused a copy of the foregoing *AMEREN TRANSMISSION COMPANY OF ILLINOIS' RESPONSE IN OPPOSITION TO PETITION TO INTERVENE AND DUE PROCESS MOTION TO STRIKE PROCEEDINGS AS TO THE MT. ZION TO KANSAS SEGMENT* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0598.

*/s/ Albert D. Sturtevant*

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